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No. 587

In the

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,
Appellant,

v.

EVETTS HALEY, JR.,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OPPOSING JURISDICTION

Appellee submits that this Court is without Jurisdiction to review this cause on Direct Appeal from the District Court; the prerequisite to a direct appeal to this Court under Title 28 U. S. C. Section 1252, relied upon by Appellant to give this Court Jurisdiction, to wit: "a *judgment, decree or order* * * * holding an Act of Congress unconstitutional", is wholly absent from the *Judgment* appealed from.

The adjudication clause of said *Judgment* adjudges that "the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff,". (Jurisdictional Statement, Appendix B, Page 21.) Neither the Constitution of the United States, nor any Act of Congress is mentioned in the *Judgment* appealed from.

Appellee submits that this Court is without authority to extend its Appeliate Jurisdiction beyond the limits fixed by Statute.

No "Civil Penalty" Being Involved in This Action, No Substantial Question is Presented.

The question presented (JS-2) by Appellant is stated to be: "Whether the *civil* penalty imposed by the Agricultural Adjustment Act of 1938 for wheat produced in excess of a farm's wheat acreage allotment is, as applied to wheat wholly consumed on the farm, within the commerce power of Congress."

The Appellant, United States of America, established the Agricultural Adjustment Act of 1938 as a *penal* statute, to deprive a California State Court of Jurisdiction in the case *of Western Fruit Growers v. United States in 1941 (124 Fed. 2d 381 at pages 386 and 387)*. The action brought by Appellant sought to recover a penalty imposed by the same "penal statute." The penalty cannot be "criminal" or "penal" in California, to deprive a State Court of Jurisdiction, and "civil" in Texas, when attempted to be col-

lected from a farmer. No "civil penalty" being involved in the case, Appellee submits that no substantial question is presented.

Appellant's Proof that the Penalty was Assessed and Fixed Against Wheat Standing in the Field Upon "the Date of Destruction" Eliminated the Question of "Consumption" from the Case.

The Appellant's "Question Presented' (supra) is expressly limited to "wheat wholly consumed on the farm." The Appellant, having alleged and proved that the penalty became affixed and was assessed when the wheat was standing in the field upon the "date of destruction" (Transcript of Proceedings, Pages 90, 91), the question of consumption becomes moot and academic to the issues in the case.

Appellee submits that an academic question is not a substantial question, nor is a question, wholly unrelated to the Judgment appealed from, a substantial question.

The District Court's Rendition of Judgment in Favor of the Defendant Upon the Ground that "the Government Has Not Made a Case Against This Defendant" Gives Rise to No Substantial Constitutional Question.

This Court's attention is directed to the language of the opinion below by District Judge T. Whitfield Davidson (Jurisdictional Statement, Pages 13, 14 and 18):

> "The Government has not made a case against this defendant. It has charged him with violating the Agri-

cultural Marketing Act. Take all of the exhibits that have been offered here, and what are they called? Marketing acts, they are not production acts. All he has violated is the rule against production. He marketed nothing; he sold nothing. He produced something and he fed it to his own livestock. As Justice White said, it might enter interstate commerce, but no one knows that the cows that ate the wheat entered interstate commerce. That which is produced is not commerce. No, not until it is made such." (Page 13.)

"Has this man anything to do with commerce? Only in production. You have to extend the law to production in order to administer any punishment in this case." (Page 14.)

"I consider the interpretation of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (Page 18.)

An analysis of the foregoing quotation from the Court's opinion, shows that his finding of fact was that the act sought to be penalized was "*Production*"; that the penalty sought to be imposed was a *marketing* penalty; and that his finding of law, based on these facts, was that the interpretation given to the Act, by the Department of Agriculture, was illegal. It is not a holding that the Act is unconstitutional, but that the *interpretation and administration* thereof is illegal. It is also a flat repudiation of the Congressional attempt to augment the powers granted to Congress by the Constitution, through the simple expedient of redefining the meaning of a word, "marketing," as used in the common speech of the people of the United States. The trial Court, in holding that production was a subject reserved to the States and the People under the Tenth

Amendment, applied to the Constitution the rule of construction of statutes as stated by Justice Frankfurter: "And so we assume that Congress uses words in their popular meaning, as used in the common speech of men." (47 Col. L. R. 527, 536.)

The Court found as a fact that the Department of Agriculture was trying to impose a penalty upon production. His conclusion of law was that the Constitution does not say that "Congress shall have the power to regulate production in agriculture." By virtue of these findings that only "production" is here involved, whether Congress has power under the Commerce Clause to regulate "consumption" of wheat is not a substantial question reviewable by this Court on direct appeal.

The Judgment Having Found For the Defendant on the "Law and the Facts", One Alleged Error as Presented in the Question on Appeal Will Not Raise a Substantial Question for Review by This Court when the Case Involved Multiple Issues of Law and Fact.

No formal request for amended findings of fact or conclusions of law were made to the District Court upon trial of the instant case. The Defendant by way of defense questioned the Constitutionality of the Agricultural Adjustment Act of 1938, as Amended, alleging violation of the Constitution in eleven respects, as follows:

1. Article I, §7—an invalid attempt to impose a criminal penalty by Congressional Resolution, rather than law;

2. Article I, §8(1)—an invalid authorization of the expenditure of public funds for private rather than public benefit;

3. Article I, §8(3)—an attempted illegal exercise of power under the commerce clause;

4. Article I, §8(18)—an invalid attempt to regulate agricultural production within a State;

5. Article I, §9(4)—an invalid imposition of a direct tax upon a portion of the people;

6. Article I, §9(5)—an invalid imposition of a tax on exports from the several States;

7. Amendment IV—an invalid provision for illegal seizure;

8. Amendment V—invalid seizure of property for private use without due process or just compensation;

9. Amendment VI—invalid as an imposition of criminal punishment without provision for jury trial;

10. Article I, §9(3)—invalid as an attempted expropriation of private property by retroactive law;

11. Article I, §8—invalid as lacking in uniformity and universality.

The Defendant further resisted the action on the ground that implementation of the farm marketing quotas of the Act was an unconstitutional exercise of non-existing authority when the calculated national acreage allotment was below the statutory minimum.

In addition Defendant contested by allegation and proof the performance of six (6) conditions precedent to the imposition of the penalty sought to be collected.

Appellee submits that the District Court's adjudication that the law and facts were with the Defendant is equivalent to sustaining the Defendant's contentions on all issues.

Such an adjudication, combined with Appellant's failure to request additional or different findings, and its patent failure to raise the question of possible error by presenting all material questions on the appeal, constitute a waiver of any error, in the District Court's Findings of Fact and Law as to seventeen of the legal issues involved, and acquiescence in the correctness of the Court's ruling thereon. Appellee submits that since the Judgment must be affirmed upon any ground that will support it, the question of error in one alleged ruling on one alleged issue can in no way be considered substantial. Appellant having acquiesced in all of the Court's rulings other than the one involved in the "Question Presented," if any, the Appeal should be dismissed or the Judgment of the District Court should be affirmed as rendered.

Wickard v. Filburn is Not Controlling as It Is Distinguishable on Its Facts.

Appellant states that the district court's decision is squarely contrary to *Wickard v. Filburn, 317 U. S. 111*, and concludes that summary reversal of the decision of the district court would be appropriate, with remand of the

cause to that court for such further proceedings as may be necessary to determine all questions, other than constitutionality of the statute, which are in issue. In the light of the question on appeal and the *judgment* appealed from, *Wickard v. Filburn* is readily and clearly distinguishable on its facts. The judge below, Honorable T. Whitfield Davidson, wisely observed in this connection: "I hardly think, however, that the Court that sustained this law had before it the record that has been made here, with its direful effects upon the public." (Jurisdictional Statement at page 9.)

Wickard v. Filburn held the imposition of *a* penalty, not a *civil* penalty, for the actions there involved, to be constitutional under the Commerce Clause. Here the Court, under the evidence, did not find the Act of Congress to be unconstitutional but that the Department of Agriculture "has so construed its powers it has created a *practice* which is against public policy and is unlawful." (Jurisdictional Statement at page 16.) The Court likewise observed: "I consider the *interpretation* of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (Jurisdictional Statement at page 18.) The evidence herein clearly proved that defendant Haley marketed nothing, sold nothing and no where entered into the marts of commerce. (Jurisdictional Statement at page 19.)

The court below having held that defendant in *producing* a crop of wheat had not violated the Act which is actually

a *marketing* Act, the question on appeal relating to constitutionality is not substantial and the appeal should be dismissed or the decision and judgment below affirmed.

It should be noted that *Wickard v. Filburn* is also distinguishable for other substantial reasons. In instant case, Haley was afforded a full trial by the Court and all issues of fact and law were contested. The disposition of the wheat and the cattle to which it was fed was established by the evidence as being completely intrastate (Tr. at pages 108 through 112). In *Wickard v. Filburn*, "the case was submitted for decision on the pleadings and upon a stipulation of the facts" *(317 U. S. at page 114)*. It was even stipulated as to "a summary of the economics of the wheat industry" *(317 U. S. at page 125)*. Neither the disposition or the "intended disposition" of the crop of wheat there involved was known to the Court and the farmer's past practices in disposing of his wheat were stipulated *(317 U. S. at page 114)*. In instant cause, there was no testimony that Haley would have gone into the market and purchased wheat to feed his cattle had he not produced the wheat used to feed them, nor was there testimony that he would have purchased wheat rather than other suitable feed not subject to regulation under the Agricultural Adjustment Act of 1938 as amended. Hence it is not open to speculation that Haley *might* or *could* have affected interstate commerce in *wheat* in the slightest degree.

Even if the *Wickard v. Filburn* decision be regarded as controlling, it would require affirmance of the lower court.

The Court there observed: "Only when he threshed and thereby made it a part of the bulk of wheat overhanging the market did he become subject to penalty" *(317 U. S. at page 133)*. In instant cause, the government witness, Mr. Rainwater, testified without contradiction that the penalty attached on the "date of destruction" while the wheat was still standing in the field and before harvesting (Tr. at pages 90 and 91). It should be obvious that the quoted statement from *Wickard v. Filburn* would require the affirmance of the lower court if the *Wickard* decision be found applicable.

The Court in the *Wickard* decision, in discussing the question of whether the farmer had been denied due process of law, observed, "It only appears that if he could get all that the government gives and do nothing that the government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law" *(317 U. S. at page 133)*. The Haley farm was in the Soil Conservation program when purchased by Haley and he *cooperated* with the Government the following year (Tr. at pages 122 and 123), but he at no time applied for nor received any payments or benefits under the law under which he is sought to be penalized (Tr. at page 114 and pages 124 through 127). It is therefore urged that *Wickard v. Filburn* is no authority insofar as due process of law to the defendant in this case is concerned, even if such decision be considered comparable to this cause.

The Decision Below Should be Affirmed on the Authority of United States v. Butler (297 U. S. 1).

To the extent that the Agricultural Adjustment Act of 1938 as amended may be construed to regulate production of wheat by defendant Haley, it is unconstitutional by authority of *United States v. Butler (297 U. S. 1)*, which decision declared invalid the Agricultural Adjustment Act of 1933. Although that case directly involved the taxing power of Congress as an incident of a plan to regulate and control agricultural production, it embraced all of the enumerated powers of Congress *including the commerce power*. The Act there involved referred to a burden upon and an obstruction of the normal currents of commerce, but did not purport to regulate transactions in interstate or foreign commerce. *(297 U. S. at page 63.)* As one of the enumerated powers, the commerce clause was embraced in the following holding by the Court: "* * *, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." * * * "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohib-

ited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden." *(297 U. S. at page 68.)* To hold that no power was expressly delegated to control production necessarily required the conclusion by the Court in that case that such power was not contained or reasonably implied in the commerce power. The Court further stated *(297 U. S. at page 68)*: "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." (Citing *Child Labor Tax Case, 259 U. S. 20; Hill v. Wallace, 159 U. S. 44; Linder v. United States, 268 U. S. 5, 17; United States v. Constantine, 296 U. S. 287.)*

The Court below likewise held there was no delegated power in the Constitution whereby the Congress could control agricultural *production*. It pointed out there has been no amendment to the Constitution authorizing the Congress or the Secretary of Agriculture, or the Department of Agriculture to tell the farmer what he may plant and what he may do in his farm work. The Court below further noted that production is not commerce; it may pass into commerce but it is not commerce until it does. (Jurisdictional Statement at pages 9, 10 and 11.) Referring to the legislative finding of the Act in *7 U. S. C. A. 1331* (Appendix A at pages 15 and 16) that "It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be protected from such burdensome surpluses and distressing shortages, * * *," the Court affirms the accepted principle enunciated in the *Butler*

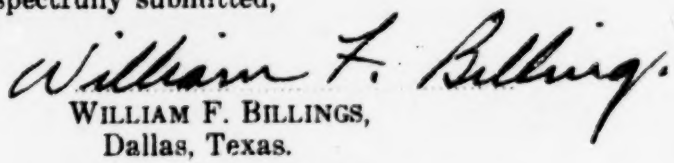
case (supra) that Congress has no independent power to provide for the general welfare. It would appear most obvious that Congress has no power to regulate production of wheat in the interest of the general welfare.

The decision below being consistent with the *Butler* case (supra) should be affirmed, or the appeal should be dismissed as no substantial question is presented.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the appeal be dismissed or in the alternative, the decision and judgment below be affirmed.

Respectfully submitted,



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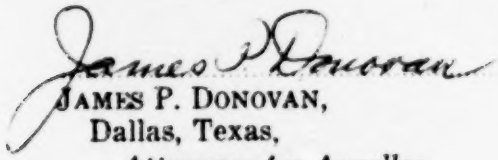

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APPENDIX A

The Agricultural Adjustment Act of 1938, as amended and supplemented, provides in part as follows:

Sec. 331. Legislative findings

Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the country-wide market and, as wheat or flour, flows almost entirely through instrumentalities of interstate and foreign commerce from producers to consumers.

Abnormally excessive and abnormally deficient supplies of wheat on the country-wide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.

It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be pro-

tected from such burdensome surpluses and distressing shortages, and that a supply of wheat be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of such burdensome surpluses. Such surpluses result in disastrously low prices of wheat and other grains to wheat producers, destroy the purchasing power of grain producers for industrial products, and reduce the value of the agricultural assets supporting the national credit structure. Such shortages of wheat result in unreasonably high prices of flour and bread to consumers and loss of market outlets by wheat producers.

The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat or provide for the orderly marketing thereof in interstate and foreign commerce.

The provisions of sections 331-339 of this title affording a cooperative plan to wheat producers are necessary in order to minimize recurring surpluses and shortages of wheat in interstate and foreign commerce, to provide for the maintenance of adequate reserve supplies thereof, and to provide for an adequate flow of wheat and its products

in interstate and foreign commerce. The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions. Feb. 16, 1938, 3 p. m., c. 30, Title III, § 331, 52 Stat. 52.